U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-T- INC

DATE: JUNE 13, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an information consulting business, seeks to employ the Beneficiary as a software development engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition. The Director determined that the record did not establish that the offered position was a *bona fide* job offer or that the Petitioner had the ability to pay the proffered wage.

The matter is now before us on appeal. The Petitioner submits additional evidence and states that it is "ready, able, and willing to employ the beneficiary in a bona fide full time, permanent position." It also maintains that it has the ability to pay the proffered wage to the Beneficiary in this case, as well as the proffered wages of the beneficiaries of the other employment-based petitions it has filed with U.S. Citizenship and Immigration Services (USCIS). Upon *de novo* review, we will dismiss the appeal.

I. BONA FIDE JOB OPPORTUNITY

A labor certification is valid only for the particular job opportunity, the beneficiary and the stated geographical area of intended employment. 20 C.F.R. § 656.30(c). A petitioner must intend to employ a beneficiary according to the terms of the labor certification accompanying the visa petition. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (upholding a visa petition denial where the petitioner did not intend to employ the beneficiary as a live-in domestic worker pursuant to the terms of the labor certification).

For labor certification purposes, "employment" means "permanent, full-time work" and "employer" is an entity "that proposes to employ a full-time employee at a place within the United States. 20 C.F.R. § 656.3. The filing of a labor certification application establishes a priority date for an immigrant visa petition. 8 C.F.R. § 204.5(d). A petitioner must therefore establish that a job offer was realistic as of a petition's priority date and remained realistic until the beneficiary obtains lawful permanent residence. *Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977)

(holding that a petition "seeks to establish that the employer is making a realistic job offer . . . at the time the petition is filed").

The visa petition in this case is supported by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which the Petitioner filed with the U.S. Department of Labor (DOL) on October 15, 2012. It reflects that the Petitioner wishes to employ the Beneficiary at its headquarters in Florida (Part H.l. and H.2.), with "travel to various unanticipated locations throughout the U.S. for different short & long term assignments" (H.14.).

On November 25, 2014, the Director issued a request for evidence (RFE) to the Petitioner, informing it that he found the disparity between its seven employees and the 85 employment-based visa petitions it had filed (as of the date of the RFE) to raise questions regarding its intent to employ the Beneficiary on a full-time, permanent basis. To establish the *bona fide* nature of the offered position, the Director asked the Petitioner for the location of the Beneficiary's intended employment, and copies of any contracts under which he would be employed, as well as evidence establishing that it would control the terms of the Beneficiary's employment in the offered position.

In his April 24, 2015, denial of the visa petition, the Director, discounting the Petitioner's assertions regarding its inability to identify the Beneficiary's future work assignments, found that, as it had not submitted evidence establishing the specifics of the Beneficiary's future employment, it had not demonstrated its intent to employ the Beneficiary in the offered position. Accordingly, he concluded that the offered position was not a *bona fide* job opportunity.

The Board of Alien Labor Certification Appeals considered the *bona fides* of job offers similar to the offered position in *Matter of Amsol, Inc.* (*Amsol*), 2008-INA-00112, 2009 WL 2869970 (BALCA Sept. 3, 2009). As in this case, the employer in *Amsol* sought to employ software engineers from its headquarters and other "unanticipated" client sites in the United States. *Amsol*, 2009 WL 2869970 at *3.

In *Amsol*, DOL stated its inability to determine whether the offered positions constituted full-time, permanent jobs because the record lacked evidence regarding the specific clients for whom the beneficiaries would work, their proposed lengths of employment, and the effect of terminations of client contracts on their status and compensation if no imminent re-assignments existed. *Id.* It requested additional evidence from the employer, including copies of contracts under which the foreign nationals would be employed. *Id.*

The employer in *Amsol* provided copies of client contracts under which the foreign nationals worked. *Id.* at *9. However, DOL denied the labor certification applications, finding that the contracts did not provide the addresses, job duties, or work schedules as requested. *Id.* In vacating DOL's decision, BALCA stated: "While the Employer has the burden of proving that the job opportunity is permanent and full-time, requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Id.*

Although the BALCA decision in *Amsol* does not bind us in this matter, we, nevertheless, take note of its reasoning, in light of the similar issues considered in the present matter.

As noted above, the Director's RFE in this case requested evidence similar to that sought by DOL in *Amsol*. In response, the Petitioner submitted a letter stating its intention to employ the Beneficiary permanently in the offered position and that it would be in control of his employment at contracted employment sites. It maintained, however, that it could not provide the specific contracts under which the Beneficiary would be employed as the nature of its business was to place IT professionals, as necessary, throughout the United States. As an example of one of its contracts, the Petitioner submitted a copy of an August 7, 2012, statement from Resources Manager, The statement indicates that the Beneficiary is working for the as a contract implementation specialist/sr. storage administrator, but that the Petitioner, as his employer, is in control of his work, benefits, salary, and assignments. As further evidence of its control over the Beneficiary's employment, the Petitioner also provided a copy of its employment contract with the Beneficiary. The Director found neither document to respond to the RFE.

We find the Director need not have required the Petitioner to submit evidence of the Beneficiary's intended work location and the contracts under which he would be employed. As BALCA stated in *Amsol*, "requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Amsol*, 2009 WL 2869970 at *9. Moreover, as the Petitioner states on appeal, an immigrant visa petition represents an offer of future employment. No USCIS regulations require the Beneficiary to be employed by the Petitioner prior to being awarded lawful permanent resident status.

Therefore, we do not find the Petitioner's inability to produce contracts and details of the Beneficiary's proposed work assignments to reflect that it does not intend to employ him in the offered position. However, the Petitioner cannot establish the offered position as a *bona fide* job opportunity based solely on its stated intent to employ the Beneficiary in the offered position once he obtains lawful permanent resident status. It must provide evidence establishing the existence of a valid job offer as of the visa petition's priority date, i.e., it must prove that, at the time it filed the labor certification, it had contracts or existing projects on which the Beneficiary could have worked in the offered position. *Great Wall*, 16 I&N Dec. at 144.

In the present matter, the Petitioner has submitted an August 7, 2012, statement relating to the Beneficiary's H-1B employment under its contract with the The statement indicates that the Beneficiary's work for began in October 2010 and is ongoing. However, as it does not indicate the period during which the contract was in effect, we cannot conclude that the contract was in place at the time of the labor certification's filing. Moreover, the statement indicates the position filled by the Beneficiary is that of an implementation specialist/sr. storage administrator, and describes duties different from those listed in Part H.11. of the labor certification. As a result, the statement from the does not demonstrate that, at the time the Petitioner filed the labor certification, it had existing contracts under which the Beneficiary could have been employed in the offered position.

The Beneficiary's H-1B employment contract, which covers the time period July 25, 2012, to July 30, 2015, also does not establish the existence of a full-time, permanent job offer as of the visa petition's priority date. While it reflects the terms of the Beneficiary's H-1B employment with the Petitioner, it does not identify any client sites or projects where the Beneficiary will be employed during the specified period. Further, as the annual salary ($73,000) set by the contract is lower than the proffered wage of $83,720, it does not appear that the work to be performed by the Beneficiary under the contract is equivalent to the offered position. Accordingly, the Beneficiary's 2012 contract does not prove the Petitioner's intent to employ the Beneficiary in the offered position.

The Petitioner has submitted insufficient evidence to indicate that at the time of the labor certification's filing, it had any existing or projected projects on which the Beneficiary could have worked in the offered position. Accordingly, the record does not establish that, as of the date on which it filed the labor certification, the Petitioner intended to employ the Beneficiary in the offered position on a permanent, full-time basis. We will, therefore, affirm the Director's finding that the record does not establish the offered position as a *bona fide* job offer.

II. ABILITY TO PAY THE PROFFERED WAGE

The Director's denial of the visa petition was also based on his determination that the record did not contain sufficient evidence to establish the Petitioner's continuing ability to pay the Beneficiary the proffered wage during the relevant period. For the reasons that follow, we will also affirm the Director's ability to pay determination.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, a petitioner must establish that the job offer was realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires a petitioner to demonstrate financial resources sufficient to pay a beneficiary's proffered wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the present case, the priority date of the visa petition is October 15, 2012. Part G.1. of the labor certification reflects that the proffered wage in this matter is $83,720.00 per year. Therefore, to establish its ability to pay the proffered wage, the Petitioner must establish that it had a continuing ability to pay the annual wage of $83,720 to the Beneficiary from the October 15, 2012, priority date onward.

On appeal, the record of proceeding contains the following evidence relating to the Petitioner's ability to pay the proffered wage as of the priority date: its 2012 and 2013 Forms 1120S, U.S. Income Tax Returns for an S Corporation; its Tax Return Transcripts for 2012 and 2013; copies of Forms I-797C, Notices of Action, relating to its Form I-140 filings; Forms W-2, Wage and Tax Statements, as well as earnings statements, issued to the Beneficiary from 2012 through 2014; Forms W-2 issued to its employees in 2013 and 2014; a number of 2014 earnings statements issued to other employees; its bank statements for 2013 and 2014; listings of the beneficiaries for whom it indicates that Forms I-140 were pending during the relevant period; and copies of withdrawal requests for previously filed Forms I-140, all written by the Petitioner in 2015.

To determine a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence may be considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).[1] If the petitioner's net income during the required time period does not equal or exceed the proffered wage, or when added to any wages paid to the beneficiary does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of a petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

[1] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh,* 719 F. Supp. 532 (N.D. Texas 1989); K.*C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Where a petitioner has filed multiple Forms I-140 for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each. *See* 8 C.F.R. § 204.5(g)(2); *see also See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS adds together the proffered wages for each beneficiary for each year starting from the priority date of the petition being adjudicated, and analyzes the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered after the dates any beneficiary obtained lawful permanent residence, or after the date a Form I-140 petition was withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not require a petitioner to establish the ability to pay additional beneficiaries for any year that the beneficiary of the petition under consideration was paid the full proffered wage.

Here, a review of USCIS databases finds that during 2013 and 2014, the Petitioner had multiple Form I-140 petitions that had been approved by USCIS or were awaiting its decision. Accordingly, in these years, it is required to establish not only its ability to pay the proffered wage to the Beneficiary, but also the proffered wages of these additional beneficiaries.

A. Ability to Pay – 2012

A review of USCIS databases finds that in 2012, the Petitioner had not yet submitted any Form I-140 petitions to USCIS. Therefore, to establish its ability to pay the wage as of the October 15, 2012, priority date, it must establish its ability to pay the proffered wage of $83,720 to the Beneficiary.

The record reflects that the Petitioner paid $12,166.06 to the Beneficiary in 2012, or $79,083.29 less than the proffered wage. The Petitioner's 2012 Form 1120S, U.S. Income Tax Return for an S Corporation, reports $218,218 in net current assets, an amount greater than the wages owed to the Beneficiary in 2012.

B. Ability to Pay – 2013 and 2014

To establish its ability to pay, the Petitioner initially provided a list of 12 beneficiaries (including the Beneficiary in this case) to whom, it believed, it had an obligation to pay the proffered wage, submitting the proffered and actual wages for each individual. This chart, submitted in response to the Director's November 25, 2014, RFE, reflects that the Petitioner filed for five of the listed beneficiaries (including the Beneficiary) in 2013 and the remaining seven in 2014. In support of the chart, the Petitioner submitted Forms I-797C, Notices of Action, and copies of Forms W-2 and earnings statements issued in 2013 and 2014.

On appeal, the Petitioner submits a new listing of the Form I-140 beneficiaries whose proffered wages, it believes, it remains obligated to pay. Six beneficiaries (including the Beneficiary) are listed, two (including the Beneficiary) for whom the Petitioner filed Forms I-140 in 2013 and four for whom it filed Forms I-140 in 2014. To establish that it is no longer required to consider the proffered wages of all of the Form I-140 beneficiaries listed in the chart it submitted in response to

the RFE, the Petitioner provides copies of 12 letters, each of which is dated April 14, 2015, and requests the withdrawal of a previously filed Form I-140 petition, and a March 3, 2015, USCIS acknowledgement of the Petitioner's February 6, 2015, withdrawal of an additional Form I-140 beneficiary.

The Petitioner's calculation of the number of beneficiaries for whom Form I-140 petitions were pending or approved in 2013 and 2014 is not accurate. Although the listing it submitted in response to the Director's RFE reported that it had filed five Forms I-140 in 2013, USCIS databases reflect that, after submitting the Form I-140 for the Beneficiary, the Petitioner filed eight additional petitions.[2] Similarly, USCIS databases reflect that the Petitioner filed 11 Forms I-140 in 2014, not the seven reported in its initial chart.[3]

While we note the Petitioner's 2015 withdrawals of 13 of the Forms I-140 it filed in 2013 and 2014, these withdrawals do not relieve it of its proffered wage obligations to these beneficiaries during 2013 and 2014, when the Forms I-140 filed on their behalf were still pending. Therefore, to establish its ability to pay in 2013, the Petitioner must demonstrate that it had the financial resources to cover the proffered wages owed to the Beneficiary and the eight additional beneficiaries for whom it filed Form I-140 petitions that year. In 2014, the Petitioner's combined proffered wage obligation is considerably greater as USCIS records indicate that all of the Forms I-140 filed by the Petitioner in 2013 remained pending in 2014. Accordingly, the total number of approved or pending Form I-140 petitions in 2014 was 19 (including the Beneficiary). To establish its ability to pay the proffered wage in 2014, the Petitioner must, therefore, demonstrate that it was not only able to pay the proffered wage of $83,720 to the Beneficiary, but also the combined proffered wages of the 18 additional beneficiaries with approved or pending Forms I-140.

The record, however, does not document the proffered wages for all of the beneficiaries reflected in USCIS data bases. Neither does it provide evidence of the actual wages, if any, that were paid to all of these individuals by the Petitioner in 2013 and 2014. Accordingly, we are unable to determine the Petitioner's ability to pay in either 2013 or 2014 based on the net current assets of $276,701 reported in its 2013 Form 1120S, U.S. Income Tax Return for an S Corporation. Further, without evidence of the proffered and actual wages for all of the beneficiaries for whom Form I-140 petitions were approved or pending in 2013 and 2014, we cannot conduct a meaningful analysis of the totality of the Petitioner's circumstances under *Matter of Sonegawa.* We, therefore, find that the record does not establish the Petitioner's continuing ability to pay the proffered wage from the October 15, 2012, priority date onward. For this reason as well, we will affirm the Director's denial of the visa petition and dismiss the appeal.

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[2] The receipt numbers for the eight filings are: and

[3] The receipt numbers for the 11 filings are: and (filed for the same individual), and

III. BENEFICIARY QUALIFICATIONS

Although the Director's April 24, 2015, decision found the Petitioner to have established the Beneficiary's qualifications for the offered position as of the visa petition's October 15, 2012, priority date, our review of the record on appeal has identified inconsistencies that raise doubts regarding the Beneficiary's employment claims on the labor certification.

A petitioner must establish a beneficiary's possession of all the education, training, or experience stated on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* We must examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). Interpretation of the job's requirements, as stated on the labor certification involves reading and applying *the plain language* of the labor certification application form. *Id.* at 834.

In the present case, the labor certification requires the Beneficiary to have 24 months of experience in the job offered, software development engineer, or as a computer or engineering professional. In Part K. of the labor certification, the Beneficiary claims the following qualifying experience:

- IT Consultant, [redacted] as of August 24, 2012;
- Computer Professional, [redacted] from April 10, 2009 until August 23, 2012; and
- Computer Professional, [redacted] from March 10, 2006 until December 20, 2007.

As required by the regulations at 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A), the Petitioner has submitted experience letters in support of the above claims. It asserts that the Beneficiary's prior employment with [redacted] and [redacted] provides him with more than five years of qualifying experience as of the petition's priority date.

To establish the Beneficiary's employment with [redacted] the Petitioner initially submitted a January 14, 2015, statement from [redacted] Project Manager at [redacted] states that the Beneficiary was employed full-time by his company as a project engineer from March 10, 2006, to December 20, 2007. He further asserts that [redacted] is now [redacted] as the result of a name change that took place on April 1, 2013.

However, additional documentation submitted by in response to overseas USCIS inquiries raises questions regarding the reliability of statement. One of the documents, dated May 31, 2006, lists the Beneficiary as an insured employee of not A second document, a 2006 personal performance appraisal form, also indicates that the Beneficiary was then employed by Proof of the Beneficiary's employment with is provided by two listings of its insured employees for the periods April 2007 to September 2007, and October 2007 to March 2008. The first listing reflects that the Beneficiary was employed a total of 183 days; the second listing reports 61 days of employment. Accordingly, we do not find the record to support the Beneficiary's claim to have been employed by as a computer professional from March 10, 2006, until December 20, 2007. The Petitioner must resolve any material inconsistencies in the record by competent, objective evidence. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

To resolve the above inconsistencies, provided a second letter regarding its employment of the Beneficiary, which is dated February 17, 2016, and signed by who is identified as an "authorized signatory" for the company. letter states that the Beneficiary was employed between March 2006 and December 2007 by which underwent multiple name changes beginning in 2006. He asserts that, in 2006, name was that from April 2007 to March 2008, the company was called and that it, again, changed its name in April 2008 to While we note the history of name changes provided by his explanation is not supported by documentary evidence. As a result, it offers insufficient proof that employed the Beneficiary from March 10, 2006, to December 20, 2007, regardless of the company name reflected on the documentation of his employment. The Petitioner must resolve any material inconsistencies in the record by competent, objective evidence. *Id.*

Further, the evidence of record also raises questions about the reliability of the Beneficiary's claim to have been employed as a computer professional with from April 10, 2009, until August 23, 2012.

As evidence of the Beneficiary's prior employment with the Petitioner has submitted a January 15, 2015, statement from HR Manager at states that the Beneficiary worked for from April 10, 2009, to August 23, 2012. However, copies of the Beneficiary's Forms W-2 for 2010 and 2011 cast doubt on this claim, as they reflect income from a second business entity. The Beneficiary's 2010 Forms W-2 reflect $9,166.67 in income from and $20,460 in income from his 2011 Form W-2 shows he earned $48,273.64 in income from

To explain the Forms W-2 issued to the Beneficiary by the Petitioner has submitted a copy of a February 10, 2011, statement from PHR, HR Client Services, Human Resource Business Partner at and a copy of a contract between and signed by on May 18, 2010, and on January 27, 2011.

In her statement, describes as a provider of human resources services, delivering and managing employee benefits, managing payroll processing and tax filing, through a "co-employment" relationship. She indicates that is "the employer of record" on the Forms W-2 issued to its clients' employees, but that, under contract with retains "full responsibility at all times for its business, products and services," as well as the "right to control the means and manner of each employee's performance." further states that, although name is on the paychecks issued to employees, the funds come from

The explanation offered by for the Forms W-2 issued by does not, however, resolve our concerns regarding relationship to the Beneficiary. We note that the contract between and was not signed by until January 27, 2011, and, therefore, does not appear to have been in effect during 2010 to explain the Form W-2 that issued to the Beneficiary that year. As a result, the record does not establish that was the Beneficiary's only employer in 2010, as claimed in the labor certification.

Further, contract with contains language indicating that, during the period of the contract's validity, it may have shared control of key aspects of its workers' employment with Although the contract's language (at Part I.B.1. and 2.) states that will retain control over its employees' day-to-day job duties and worksites, the contract also indicates (at Part I.B.4.) that and "will each have a right to hire, discipline and terminate the Worksite Employees as to each one's employment relationship with [them]." Accordingly, we do not find the record to establish that, while the contract was in effect, was the business entity with control over all aspects of the Beneficiary's employment and, therefore, his actual employer during that period.

In light of the unresolved questions relating to the Beneficiary's claimed employment with during 2010 and 2011, the record does not support his claim to have been employed by during the period April 10, 2009, until August 23, 2012, as a computer professional. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Based on the evidentiary inconsistencies in the employment experience that the Beneficiary claimed with and the questions raised regarding employment of the Beneficiary in 2010 and 2011, we do not find the record to establish that the Beneficiary has the 24 months of qualifying experience required by the labor certification.

IV. CONCLUSION

On appeal, the Petitioner asserts that the evidence it has submitted should be reviewed under the preponderance of evidence standard. We agree.

The Petitioner must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In other words, the petitioner must show that what it claims is "more likely than not" or "probably" true. To determine whether the petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). We consider the evidence both individually and in its totality. *Chawathe*, at 376.

Here, as discussed above, the record does not contain evidence of any existing or projected projects on which the Beneficiary could have been employed by the Petitioner as of the date it filed the labor certification, and, therefore, does not establish the offered position as a *bona fide* job offer. The record also lacks the financial documentation that would allow consideration of the Petitioner's ability to pay the proffered wages of the Beneficiary and the other individuals for whom it had pending or approved Forms I-140 during the relevant period. Finally, the record's documentation of the Beneficiary's employment experience raises questions regarding the reliability of his claims in the labor certification. In light of these evidentiary deficits, the Petitioner has not proved that it is more likely than not that the visa petition should be approved.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested beneficiary. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-T- Inc*, ID# 14768 (AAO June 13, 2016)